

111TH CONGRESS  
1ST SESSION

# H. R. 440

To provide small businesses certain protections from litigation excesses.

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## IN THE HOUSE OF REPRESENTATIVES

JANUARY 9, 2009

Mr. REHBERG introduced the following bill; which was referred to the  
Committee on the Judiciary

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## A BILL

To provide small businesses certain protections from  
litigation excesses.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Small Business Liabil-  
5       ity Reform Act of 2009”.

6       **SEC. 2. FINDINGS.**

7       Congress finds that—

8               (1) the defects in the United States civil justice  
9       system have a direct and undesirable effect on inter-  
10      state commerce by decreasing the availability of  
11      goods and services in commerce;

1           (2) the spiraling costs of litigation and the  
2           magnitude and unpredictability of punitive damage  
3           awards and noneconomic damage awards have con-  
4           tinued unabated for at least the past 30 years;

5           (3) the Supreme Court of the United States has  
6           recognized that a punitive damage award can be un-  
7           constitutional if the award is grossly excessive in re-  
8           lation to the legitimate interest of the government in  
9           the punishment and deterrence of unlawful conduct;

10          (4) just as punitive damage awards can be  
11          grossly excessive, so can it be grossly excessive in  
12          some circumstances for a party to be held respon-  
13          sible under the doctrine of joint and several liability  
14          for damages that party did not cause;

15          (5) as a result of joint and several liability, en-  
16          tities including small businesses are often brought  
17          into litigation despite the fact that their conduct  
18          may have little or nothing to do with the accident  
19          or transaction giving rise to the lawsuit, and may  
20          therefore face increased and unjust costs due to the  
21          possibility or result of unfair and disproportionate  
22          damage awards;

23          (6) due to high liability costs and unwarranted  
24          litigation costs, small businesses face higher costs in

1 purchasing insurance through interstate insurance  
2 markets to cover their activities; and

3 (7) legislation to address these concerns is an  
4 appropriate exercise of the powers of Congress under  
5 clauses 3, 9, and 18 of section 8 of article I of the  
6 Constitution of the United States, and the 14th  
7 amendment to the Constitution of the United States.

8 **SEC. 3. DEFINITIONS.**

9 In this Act:

10 (1) CRIME OF VIOLENCE.—The term “crime of  
11 violence” has the same meaning as in section 16 of  
12 title 18, United States Code.

13 (2) DRUG.—The term “drug” means any con-  
14 trolled substance (as defined in section 102 of the  
15 Controlled Substances Act (21 U.S.C. 802)) that  
16 was not legally prescribed for use by the defendant  
17 or that was taken by the defendant other than in ac-  
18 cordance with the terms of a lawfully issued pre-  
19 scription.

20 (3) ECONOMIC LOSS.—The term “economic  
21 loss” means any pecuniary loss resulting from harm  
22 (including the loss of earnings or other benefits re-  
23 lated to employment, medical expense loss, replace-  
24 ment services loss, loss due to death, burial costs,  
25 and loss of business or employment opportunities) to

1 the extent recovery for such loss is allowed under ap-  
2 plicable State law.

3 (4) HARM.—The term “harm” means any phys-  
4 ical injury, illness, disease, or death or damage to  
5 property.

6 (5) INTERNATIONAL TERRORISM.—The term  
7 “international terrorism” has the same meaning as  
8 in section 2331 of title 18, United States Code.

9 (6) NONECONOMIC LOSS.—The term “non-  
10 economic loss” means loss for physical or emotional  
11 pain, suffering, inconvenience, physical impairment,  
12 mental anguish, disfigurement, loss of enjoyment of  
13 life, loss of society and companionship, loss of con-  
14 sortium (other than loss of domestic service), injury  
15 to reputation, or any other nonpecuniary loss of any  
16 kind or nature.

17 (7) PERSON.—The term “person” means any  
18 individual, corporation, company, association, firm,  
19 partnership, society, joint stock company, or any  
20 other entity (including any governmental entity).

21 (8) PUNITIVE DAMAGES.—The term “punitive  
22 damages” means damages awarded against any per-  
23 son or entity to punish or deter such person, entity,  
24 or others from engaging in similar behavior in the  
25 future. Such term does not include any civil pen-

1 alties, fines, or treble damages that are assessed or  
2 enforced by an agency of State or Federal govern-  
3 ment pursuant to a State or Federal statute.

4 (9) SMALL BUSINESS.—

5 (A) IN GENERAL.—The term “small busi-  
6 ness” means any unincorporated business, or  
7 any partnership, corporation, association, unit  
8 of local government, or organization that has  
9 fewer than 50 full-time employees as deter-  
10 mined on the date the civil action involving the  
11 small business is filed.

12 (B) CALCULATION OF NUMBER OF EM-  
13 PLOYEES.—For purposes of subparagraph (A),  
14 the number of employees of a subsidiary of a  
15 wholly owned corporation includes the employ-  
16 ees of—

17 (i) a parent corporation; and

18 (ii) any other subsidiary corporation  
19 of that parent corporation.

20 (10) STATE.—The term “State” means each of  
21 the several States, the District of Columbia, the  
22 Commonwealth of Puerto Rico, the Virgin Islands,  
23 Guam, American Samoa, the Northern Mariana Is-  
24 lands, any other territory or possession of the

1 United States, or any political subdivision of any  
2 such State, commonwealth, territory, or possession.

3 **SEC. 4. LIMITATION ON PUNITIVE DAMAGES FOR SMALL**  
4 **BUSINESSES.**

5 Except as provided in section 6, in any civil action  
6 against a small business, punitive damages may, to the  
7 extent permitted by applicable Federal or State law, be  
8 awarded against the small business only if the claimant  
9 establishes by clear and convincing evidence that conduct  
10 carried out by that defendant with a conscious, flagrant  
11 indifference to the rights or safety of others was the proximate  
12 cause of the harm that is the subject of the action.

13 **SEC. 5. LIMITATION ON JOINT AND SEVERAL LIABILITY**  
14 **FOR NONECONOMIC LOSS FOR SMALL BUSI-**  
15 **NESSES.**

16 (a) GENERAL RULE.—Except as provided in section  
17 6, in any civil action against a small business, the liability  
18 of each defendant that is a small business, or the agent  
19 of a small business, for noneconomic loss shall be deter-  
20 mined in accordance with subsection (b).

21 (b) AMOUNT OF LIABILITY.—

22 (1) IN GENERAL.—In any civil action described  
23 in subsection (a)—

24 (A) each defendant described in that sub-  
25 section shall be liable only for the amount of

1 noneconomic loss allocated to that defendant in  
2 direct proportion to the percentage of responsi-  
3 bility of that defendant (determined in accord-  
4 ance with paragraph (2)) for the harm to the  
5 claimant with respect to which that defendant  
6 is liable; and

7 (B) the court shall render a separate judg-  
8 ment against each defendant described in that  
9 subsection in an amount determined under sub-  
10 paragraph (A).

11 (2) PERCENTAGE OF RESPONSIBILITY.—For  
12 purposes of determining the amount of noneconomic  
13 loss allocated to a defendant under this section, the  
14 trier of fact shall determine the percentage of re-  
15 sponsibility of each person responsible for the harm  
16 to the claimant, regardless of whether or not the  
17 person is a party to the action.

18 **SEC. 6. EXCEPTIONS TO LIMITATIONS ON LIABILITY.**

19 The limitations on liability under sections 4 and 5  
20 do not apply—

21 (1) to any defendant whose misconduct—

22 (A) constitutes—

23 (i) a crime of violence; or

24 (ii) an act of international terrorism;

(B) results in liability for damages relating to the injury to, destruction of, loss of, or loss of use of, natural resources described in—

(i) section 1002(b)(2)(A) of the Oil Pollution Act of 1990 (33 U.S.C. 2702(b)(2)(A)); or

(ii) section 107(a)(4)(C) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607(a)(4)(C));

(C) involves—

(i) a sexual offense, as defined by applicable State law; or

(ii) a violation of a Federal or State civil rights law;

(D) occurred at the time the defendant was under the influence (as determined under applicable State law) of intoxicating alcohol or a drug, and the fact that the defendant was under the influence was the cause of any harm alleged by the plaintiff in the subject action; or

(2) to any cause of action which is brought under the provisions of title 31, United States Code, relating to false claims (31 U.S.C. 3729–3733) or to



1 any other cause of action brought by the United  
2 States relating to fraud or false statements.

3 **SEC. 7. PREEMPTION AND ELECTION OF STATE NON-**  
4 **APPLICABILITY.**

5 (a) PREEMPTION.—Subject to subsection (b), this  
6 title preempts the laws of any State to the extent that  
7 State laws are inconsistent with this title.

8 (b) ELECTION OF STATE REGARDING NONAPPLICA-  
9 BILITY.—This title does not apply to any action in a State  
10 court against a small business in which all parties are citi-  
11 zens of the State, if the State enacts a statute—

12 (1) citing the authority of this subsection;

13 (2) declaring the election of such State that this  
14 title does not apply as of a date certain to such ac-  
15 tions in the State; and

16 (3) containing no other provision.

17 **SEC. 8. EFFECTIVE DATE.**

18 This Act shall take effect with respect to any civil  
19 action commenced after the date of the enactment of this  
20 Act without regard to whether the harm that is the subject  
21 of the action occurred before such date.

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